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No. 91-1005

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

ARDELL KIDWELL AND R. DAVID MASCIOLA,

Petitioners,

vs.

WAKEFIELD PROPERTIES, INC. AND INDIANHEAD SKI CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the district court and the court of appeals invade the fact-finding province of the jury when they concluded that petitioners' claims were barred by the provisions of the Michigan Ski Area Safety Act?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. The Nature of the Cases, and the Course of Proceedings.

Petitioners, David Masciola and Ardell Kidwell, brought separate actions in the district court alleging that the respondents are liable for injuries they sustained in an alpine ski racing event on March 16, 1986 at the Indianhead Ski Area in Ironwood, Michigan. The cases were filed in the federal court on the basis of diversity of citizenship.

Both Kidwell and Masciola were experienced alpine skiers and amateur racers. The hill on which they were racing at the time of their injuries was regularly used for that purpose. It was equipped with two permanently placed poles, depicted in the photographs included in the petitioners' appendix, for demarcation of the race course finish line. Typically, the poles would support a banner at the finish line.

Both petitioners allege that they lost control some distance before the finish. Masciola claims that while off balance and out of control, he hooked the tip of his ski on the pole to the right of the finish line, that he fell, and that he suffered injury to his knee. Kidwell claims that she lost control, fell and slid into the same pole. She suffered injuries to her leg in the collision with the pole. Petitioners make various allegations of negligence and liability with regard to location of, and protection from, the pole.

The district court consolidated the cases for trial, and they proceeded through discovery, including the taking of the petitioners' depositions. Respondents filed motions for summary judgment, briefs in support and the depositions of the petitioners for consideration in ruling on the motions. Respondents also submitted, as exhibits in support of the motions, various releases and waivers of liability, some having been signed by the petitioners. Respondents included copies of lift tickets, representative of those purchased by the petitioners, which contained waiver and release agreements. Respondents argued that petitioners' claims were barred by the releases and waivers.

The district court heard argument on the motions on September 20, 1990. In a oral opinion the judge denied summary judgment on the basis of the releases and waivers. The judge granted the motion, however, on the basis of the Michigan Ski Area Safety Act, MCL 408.342(2); MSA 18.483(22)(2), which respondents had pled as an affirmative defense.

B. Statement of Facts.[1]

1. The Allegations of the Petitioners' Complaints and Respondents' Answers and Affirmative Defenses.

Petitioners' complaints both alleged that they had paid to ski and participate in races at Indianhead on March 16, 1986. Both claimed that the race that day was to have been a "downhill" event involving high speeds. Each claimed that they had fallen in a "compression area" at the end of the race course and struck the pole at the finish line.

The complaints went on to claim that the respondents were negligent as follows:

> 2. That Defendants were negligent in the operation of Indianhead and, in particular, negligent in their running, supervising, and controlling said downhill course in the following respects;
>
> (a) By maintaining permanently fixed, solid telephone poles marking the finish lines of said race course when said poles were either unpadded or inadequately padded and were reasonably certain to cause injury to a skier striking them.
>
> (b) By failing to guard said telephone poles with snow fences or by other means in

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1. References to the record in the Masciola case shall be referred to with the prefix "M," and references to the Kidwell case shall be referred to with the prefix "K."

such a manner that would prevent injury to a skier striking them when such an accident was reasonably foreseeable during the downhill race involving high speeds.

(c) By failing to provide a safe race course when they had undertaken to run said race.

(d) By failing to respond to requests for protection around said telephone poles when requests were made to them prior to accident involved herein.

(e) By failing to warn the racers participating in said race of the dangerous condition of said race course and the finish line when the dangerous condition of said course and finish line was known to them.

(f) By otherwise negligently supervising, inspecting, managing, maintaining and controlling said race course.

(M-R1: Complaint; K-R1: Complaint).

Respondents denied the allegations of negligence. They stated specifically that the poles marking the finish line were reasonably padded in accordance with all applicable standards. (M-R3: Answer; K-R4: Answer). They also stated, among others, the following affirmative defense:

1. For its first separate and complete Affirmative Defense, Defendant Wakefield reserves unto itself the benefits and immunities of

> the Michigan Ski Area Safety Act, i.e., MCLA 408.322, *et. seq.*, with specific reference, but not by way of limitation, to Sections 341 and 342.

(M-R3: Affirmative Defenses to Petitioner's Complaint; K-R4: Affirmative Defenses to Petitioner's Complaint).

2. The Testimony of the Petitioners.

(i) Masciola and Kidwell Were Advanced Skiers and Experienced Amateur Racers.

Ms. Kidwell testified that she was a advanced skier and an experienced amateur racer. She had skied from the age of 15, and she had begun to ski regularly from the age of 30, continuing to do so for the next eleven years prior to her accident in 1986 (K-R22: Kidwell Deposition, pp. 66-68).

Ms. Kidwell said that she had been participating in organized races for about 5 years. In the 1984 and 1985 she had attended four racing clinics, each lasting two or three days. The clinics focused on general racing techniques, and included the three general racing categories; slalom, giant slalom and downhill. Ms. Kidwell had participated in "NASTAR" races throughout the 5 years (K-R22: Kidwell Deposition, pp. 71). Ms. Kidwell said that she was an expert skier (K-R22: Kidwell Deposition, pp. 74-80).

Mr. Masciola said that he was an advanced to expert skier in the winter of 1985-86. He had begun skiing in 1963 at the age of 19. He started racing in 1973 in the NASTAR, program. From 1978 through 1986 he participated in as many races as he could in the NASTAR and CMSC programs. He was, he said, consistently the top male skier in his club until the accident (M-R 21: Masciola Deposition, pp. 20-24, 29). He had been to over

thirty racing clinics, which focused on all aspects of racing including slalom, giant slalom and downhill (M-R21: Masciola Deposition, pp. 32-33).

Mr. Masciola testified that he had skied throughout the United States and Canada. He said that he had skied at Indianhead since the early to mid 1970's. He ran NASTAR races there twice per year throughout that time (M-R21: pp. 23-24).

(ii) Petitioners' Testimony Regarding the Race and the Manner in Which the Accidents Took Place.

The race in which both petitioners were injured took place on the "FIS" hill. Both had skied that hill in a race on the day before the accident. Ms. Kidwell said she had skied it four times (K-R22: Kidwell Deposition, pp. 81-82, 88; M-R21: Masciola Deposition, pp. 24-25). Both petitioners recalled that the snow was in good condition on the day that they were injured. It was hard packed, but not ice. The weather was warm and sunny, and visibility was clear (K-R22: Kidwell Deposition, p. 87; MR21: Masciola Deposition, p. 27-28).

Mr. Masciola alleges that he hit a compression bump near the bottom of the slope and lost control (M-R21: Masciola Deposition, p. 26). He claims that his ski, then, hooked the pole, causing him to turn backwards, and he fell (M-R21: Masciola Deposition, pp. 40-44).

Ms. Kidwell fell during her timed run (K-R22: Kidwell Deposition, pp. 88-89). She similarly alleges that she lost control as she passed over the compression bump. She fell and slid into the pole (K-R22: Kidwell Deposition, p. 93).

3. The Michigan Ski Area Safety Act.

The Michigan Ski Area Safety Act, MCL 408.342; MSA 18.483(22) states:

> Sec. 22. (1) While in a ski area, each skier shall do all of the following:
>
> (a) Maintain reasonable control of his or her speed and course al all times.
>
> (b) Stay clear of snow-grooming vehicles and equipment in the ski area.
>
> (c) Heed all posted signs and warnings.
>
> (d) Ski only in ski areas which are marked as open for skiing on the trail board described in section 6a(e).
>
> (2) *Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment.*

(Emphasis supplied.)

4. The Decisions of the District Court and the Court of Appeals.

The judge held that petitioners' claims were barred by the Michigan Ski Area Safety Act. He carefully examined the photographs of the finish area, and he instructed that they be entered into the record so that they could be examined by the court of appeals. He concluded that the poles at the finish line were clearly visible and obvious. Further, they were an inherent part of the skiing apparatus for the purpose of the race. The judge concluded that the pole, therefore, came within the provision of the Michigan statute.

The court of appeals affirmed the decision of the district court. The court, relying upon interpretations of the Michigan Ski Area Safety Act in Michigan Court of Appeals decisions, held that the finish line poles were obvious and necessary within the meaning of the Act. The poles, said the court, were, without question, "obvious." The court held, further, that if a structure serves some purpose or function with respect to skiing and is similar to those listed specifically in the statute, it meets the "necessary" requirement. The court said:

> The Act was designed to reduce the liability of ski area operators by making skiers liable for obvious risks of harm from skiing and to encourage skiers to accept responsibility for their own safety . . . . We do not think that the statute intended to place responsibility on the ski area operators to determine which ski equipment is the least risky and to only use that equipment . . . .

(Court of Appeals Decision, A-28). Thus, the court's only factual assumptions in reaching this decision were that the poles were plainly visible and known to the skiers, and that their purpose was to help mark the finish line.

SUMMARY OF THE ARGUMENT

The real issue in this case, both in the district court and in the court of appeals, was the proper interpretation of the Michigan Ski Area Safety Act. The lower courts held that the petitioners' claims are barred by the provisions of that act, based upon their reading of the statute and the interpretations of that statute found in decisions of the Michigan courts.

In reaching their conclusions that the petitioners' claims are barred by the Michigan statute, the lower courts relied upon certain undisputed facts, all of which are exhibited in the photographs of the finish line poles. Those photographs, included here in petitioners' appendix, were introduced at the hearing in the district court. They show that the poles were, indeed, to denote the finish line, and that their sole purpose was, therefore, to serve as skiing related fixtures. Further they were plainly visible, obvious, and, in fact, known to the petitioners prior to the runs in which they were injured.

The district court relied solely upon those undisputed facts in making its decision, and it did not invade the fact-finding province of the jury. Therefore neither the district court decision, nor the decision of the court of appeals, violates the standard for granting summary judgment. There is no merit to the petitioners' claim that the lower courts wrongfully resolved disputed facts to render their decisions.

ARGUMENT

I.

THE COURT OF APPEALS RELIED UPON MICHIGAN COURTS' INTERPRETATIONS OF THE MICHIGAN SKI AREA SAFETY ACT, AS APPLIED TO UNDISPUTED FACTS, TO CONCLUDE AS IT DID, AND THE COURT, THEREFORE, DID NOT INVADE THE FACT-FINDING PROVINCE OF THE JURY.

A. The Court of Appeals' Decision Is Based Upon Facts Which Are Beyond Dispute.

Petitioners' brief to this Court claims that the decision of the court of appeals includes factual findings that should have been left to the jury. Petitioners fail to disclose to this Court, however, the facts that were before the district court and the court of appeals; facts that were beyond any dispute whatsoever, and which formed the basis of the decisions below.

The photographs admitted at the hearing in the district court, examined by the court of appeals, and now before this Court establish the undisputed facts upon which the lower courts relied. The poles were plainly obvious to any racer involved in the event, and certainly to petitioners. That was their purpose, to be visible and obvious to denote the finish line. Second, they had nothing other than a skiing-related purpose. They constituted fixtures making up a part of the race course; in short, the finish line. Petitioners' complaints, in fact, refer to the poles as ". . . marking the finish lines of said race course . . . ."

The district court held that so long as the poles were skiing-related fixtures, they were "necessary" within the meaning of the Michigan statute, as it has been interpreted by the Michigan

courts. Having no other purpose than to act as finish line poles, they were skiing-related fixtures and, thus, "necessary." The Sixth Circuit agreed.

Petitioners' real quarrel on appeal in the Sixth Circuit was with the district court's reading of the Michigan Ski Area Safety Act. Petitioners claimed that "necessary" should not include these poles if some other safer method was available to mark the finish line. The district court and the court of appeals rejected that reading of the Michigan statute.

Petitioners now shift the focus of their appeal from the real issue. Their argument, however, is completely without merit. The facts which form the basis of the lower court decisions were not disputed. Those undisputed facts are depicted in the photographs. The poles denoted the finish line of the race course, they were installed for that purpose, and they were plainly visible to petitioners and all of the other racers. The lower courts relied upon those facts, and they did not invade the fact-finding province of the jury to discover them.

B. It Was Permissible for the District Court to Grant Summary Judgment for Reasons Other Than Those Urged by the Moving Party.

The petitioners' petition makes much of the fact that the district court dismissed this action, pursuant to the respondents motion, on grounds other than those urged in the motion. The district court may do so, however, in the appropriate situation.

In *Board of National Missions of Presbyterian Church in the United States v. Smith,* 182 F.2d 362, 364-365 (7th Cir. 1950), for example, the court said:

> . . . Rule 56(c) of the Federal Rules of Civil

> Procedure, 28 U.S.C.A., provides that: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law.
>
> In our opinion pleadings before the District Court did show that there was no genuine issue as to any material fact and also showed as a matter of law that the defendant was entitled to a summary judgment on his motion. *The fact that the judgment was granted on a reason different from that assigned by the defendant is immaterial, where, as here, the motion was properly granted on the undisputed facts shown and on an issue presented by plaintiff's complaint . . .*

(Emphasis supplied.) The Tenth Circuit reached the same conclusion, citing *Smith,* in *Broderick Wood Products Co. v. United States,* 195 F.2d 433 (10th Cir. 1952). This Court has recognized the power of district courts to grant summary judgment, *sua sponte,* in *Celotex v. Catrett,* 477 U.S. 317 at 326, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The respondents had pled the Michigan statute as an affirmative defense. Nothing would have been served by requiring the parties to return to the court later for argument on the statute. Given the court's interpretation of the Michigan statute, the petitioners could offer no other material facts. The nature, use, construction and location of the poles was not going to change. They served as a part of the race course finish line. They had no non-skiing purpose. They were visible and obvious. All of that was accurately depicted in the photographs which were offered

to, and examined by, the court. No other facts were necessary for, or could have changed, the court's decision.

C. Neither the District Court Nor the Court of Appeals Wrongly Applied the Guidelines for Summary Judgment Found in the *Celotex* Decision.

Petitioner argues that the district court and the court of appeals wrongly relied upon the decision of this court in *Celotex v. Catrett, supra. Celotex* held that a party moving for summary judgment is not necessarily required by Rule 56 to support its motion with affidavits or other similar materials negating the opponent's claim. Rather, if the non-moving party bears the burden of proof on a particular issue, and is unable to make a sufficient showing on that issue, the moving party is entitled to summary judgment.

That particular procedural question was not present in this case. The Court's broader reasoning in *Celotex* does apply, however. The Court said, referring to the various subsections of Rule 56:

> . . . The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c) is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.

Id., at 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The evidence before the district court at the time of the motion demonstrated that the standard for entry of summary judgment was met. The lower courts considered only undisputed facts and applied them to the Michigan Ski Area Safety Act. The trial court's decision was made in furtherance of the purpose of the summary judgment rule. The trial court did not exceed its authority and did not usurp the duties of the finders of fact.

CONCLUSION

The district court granted summary judgment to the respondents on the basis of the Michigan Ski Are Safety Act and the interpretations given to that statute by the Michigan courts. The court applied the statute to the undisputed facts that were properly before it when it rendered its decision. The court did not invade the fact-finding province of the jury in reaching its conclusion that petitioners' claims are barred by the provisions of the Michigan statute.

The court of appeals, therefore, properly affirmed the district court's decision. Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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